IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

SECOND APPEAL NO.32 OF 2004
WITH
CIVIL APPLICATION NO.35 OF 2004
WITH
SECOND APPEAL NO.29 OF 2004
WITH
CIVIL APPLCIATION NO.30 OF 2004

Vishwanath Vishnu Joshi. ...Appellant.
Vs.
Smt. Sarita Vishwanath Joshi. ...Respondent.

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Mr.D. V. Sutar for the Appellant.
Mr. A.A. Garge for the Respondent.

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CORAM :DR.D.Y.CHANDRACHUD, J.
July 10, 2007.

P.C.:

The Appellant and the Respondent were married in 1961. On 19th April 1987 parties jointly applied for a divorce under Section 13(B) of the Hindu Marriage Act, 1955. The petition was allowed by an order dated 19th April 1987 and the marriage solemnized between the parties was ordered to stand dissolved from the date of the order.

The Appellant instituted Special Civil Suit No. 419 of 1989 before the Civil Judge, Senior Division, Thane for specific performance of the agreement alleged to have been contained in the petition jointly instituted by the parties for a divorce by mutual consent, in respect of a residential flat (Flat No.9, Shri Kalpa Co-operative Housing Society, Dombivli (West)). The Respondent-wife instituted Regular Civil Suit No. 899 of 1994 before the Civil Judge, Senior Division, Kalyan for a permanent injunction restraining the Appellant from disturbing her possession. Both the suits were tried together and were dismissed by the Trial Judge on 22nd July 1996. The Appeals were dismissed by the Additional District Judge at Kalyan by the impugned judgment and order dated 10th September 2003.

In assailing the judgment of the Appellate Court, Counsel appearing on behalf of the Appellant urged that parties had agreed to a divorce by a mutual consent in pursuance whereof a decree was passed by the Trial Court under Section 13(B) of the Hindu Marriage

Act, 1955. The submission was that in the petition which the parties had jointly instituted, there was an agreement between the parties under which the residential flat was to stand transferred to the Appellant against the payment of Rs.6,294/- to the Respondent which was stated to have been paid by the Respondent to the Co-operative Society. Counsel submitted that the decree of divorce has attained finality and what has, in fact, been done by the Courts below in the suit for specific performance instituted by the Appellant and the suit for injunction instituted by the Respondent is to go behind the decree passed by the Trial Court in the divorce petition which is not permissible.

There is no merit in the submission. Firstly, it would be necessary to note that the relief which was sought before the Trial Court in the petition which was jointly instituted by the parties was for a dissolution of the marriage by a decree of divorce under Section 13 (B) of the Hindu Marriage Act, 1955. Counsel for the parties have both relied upon the petition filed under Section 13(B). In para 6 of the petition there was a reference to the agreement between the

parties, inter alia, for transfer of the residential flat from the Respondent to the Petitioner against the payment of Rs.6,294/-. However, it is an admitted position that after the petition was instituted before the Trial Court for divorce by mutual consent, the Respondent specifically moved an application before the Trial Court on 27th March 1987 seeking a deletion of the reference contained in the joint petition inter alia in regard to the transfer of the residential premises. The contention of the Respondent was that the reference to the transfer of the residential flat had been obtained as a result of inducement by misrepresentation. The final decree and order of the Learned Trial Judge was to allow the petition and grant a divorce by mutual consent in terms of Section 13B of the Hindu Marriage Act, 1955. The decree and order of the Learned Trial Judge did no more than to pass a decree for divorce and the marriage was dissolved with effect from the date of the decree. That indeed, was in terms of Section 13B under which the Court is required on being satisfied, after making an enquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, to pass a decree of divorce

declaring the marriage to be dissolved with effect from the date of the decree.

The suit for specific performance by the Appellant was on the basis that the parties had agreed when they applied for a decree of divorce, for a transfer of the flat from the name of the Respondent to the Appellant. The Learned Trial Judge referred to a number of circumstances which had a bearing on the issue as to whether there was indeed such an agreement between the parties. According to the Appellant, the agreement was entered into in the presence of an Advocate representing the parties in whose presence an amount of Rs.6,294/- was paid. The Trial Court noted that once the Defendant had denied the existence of such an agreement, there was a material omission on the part of the Petitioner to examine the witness who had allegedly witnessed the transaction. The alleged receipt of Exh.28 was duly considered and discarded. Most importantly, the Trial Court noted that even before the decree of divorce was passed on 27th April 1987, the Respondent had raised an objection on 9th March 1987 to the transfer of the flat to the name of the Appellant recording her

grievance in regard to Exhs.28, 29 and 30. The residential flat stood in the name of the Respondent and the share certificate stood in her name. Exh.40 was a letter from the Co-operative Society recording that no intimation has been received from the Respondent for the transfer of the flat. Finally, the Appellant was unable to adduce any evidence whatsoever to establish the definite source of income to purchase the flat and the oral evidence of witness Arun Joshi has been disbelieved by the Appellate Court in para 8 of the judgment. On the other hand, the acquisition of the flat by the Respondent from her own funds has been duly held to be established.

In the circumstances, the concurrent finding of both the Courts below in rejecting the suit for specific performance and in decreeing the suit instituted by the Respondent cannot be faulted. The Respondent was entitled to an order of injunction both on the basis of her title and possession to the residential flat. Parties are now stated to be 74 and 64 years of age respectively and it is only just that there be a hiatus of the long standing litigation. The Second Appeal does not raise any substantial question of law and the

judgments of the Courts below are

based on the evidence on the record. The appeal shall, accordingly, stand dismissed.

In view of the dismissal of the appeal, the Civil Application s do not survive and is accordingly disposed of.

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